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JURISDICTIONAL STATEMENT

This appeal is brought by the State of Missouri, sub nom. the Criminal Records Repository, from the June 2, 2004, Judgment of the Honorable Patrick Clifford of Division 39 of the Circuit Court of the County of St. Louis. The Judgment was entered, along with Findings of Fact and Conclusions of Law, after hearing on the First Amended Petition for Expungement of Arrest Records and the Affidavits on file.

Dyer does not dispute that the Supreme Court has jurisdiction over the appeal in that an alternative reason for the trial court's judgment was based upon the issue of the constitutionality of a Missouri statute. Mo. Const. Art. V § 3 (as amended 1982). Nevertheless, because this appeal may be resolved on grounds that do not involve the constitutionality of a statute, it is unnecessary for the Supreme Court to have exclusive jurisdiction to review this appeal.

STATEMENT OF THE FACTS

Respondent Scott Dyer (hereinafter "Dyer") filed the instant Petition in St. Louis County, where the arrest occurred. (LF, 21; First Amended Petition, ¶ 2). Dyer is currently a Colorado resident. (LF, 21; First Amended Petition, ¶ 1). Dyer lost his job with Delta Building Services as a Chief Building Engineer at the Alfred ARRAJ Courthouse in Denver, Colorado, because he was unable to renew his security clearance from the Department of Homeland Security in January 2004. He was unable to receive the necessary security clearance due to this Missouri arrest. (LF, 41, Affidavit of Scott Dyer; 61, Exhibit 2; 81, Exhibit 8).

At the time of the arrest on June 6, 1990, by the Florissant Police Department, Dyer was eighteen years of age. (LF, 21; First Amended Petition, ¶ 4). Dyer had no misdemeanor or felony convictions prior to that June 6, 1990 arrest or subsequent to it. (LF, 21; First Amended Petition, ¶ 3). Dyer asserts that the arrest was based on false information and that there was no probable cause at the time to believe that he had committed the offenses of forgery and stealing. (LF, 21; First Amended Petition, ¶ ¶ 5 and 6).

At the arraignment on January 25, 1991, Dyer entered a plea of not guilty to all three counts. (LF, 52). Count I for forgery was dismissed on April 5, 1991, by the State's Assistant Prosecuting Attorney. (LF, 48). On the same date, Dyer withdrew his pleas of not guilty and entered pleas of guilty to the other forgery and to the stealing over $150 counts, with the understanding that imposition of sentence would be suspended on the condition that he complete three years of probation and pay restitution of $50.00. (LF, 48, 49). Accordingly, Dyer's probationary period would have concluded on or about April 5, 1994.

Dyer testified by Affidavit[1] in the instant proceeding that he did not steal the gym bag at issue or cash the checks at issue. (LF, 41, ¶ 5). Instead, the person he was walking with at the time of the incident took the gym bag and cashed two checks under that person's name. (LF, 41, ¶ ¶ 3-4). Moreover, Dyer testified that when he entered into the prior plea negotiations, he did so with the understanding that if he successfully completed probation, as a result of this plea agreement, his record would not be adversely affected. (LF, 42, ¶ 11).

House Bill 135 was passed by the Missouri legislature in 1995 and amended § 610.122 RSMo. by, among other amendments, deleting the existing paragraph 4 and adding the following language:

The subject of the arrest did not receive a suspended imposition of sentence for the offense for which the arrest was made or for any offense related to the arrest;

1995 Mo. Legis. Serv. H.B. 135 (VERNON'S). Subsequent to the passage of House Bill 135 in 1995, Dyer did not receive a suspended imposition of sentence for the offense for which the 1990 arrest was made or for any offense related to the arrest. (LF, 21, ¶ 9; 22, ¶ 2).

Dyer's initial Petition for Expungement of Arrest Records was filed on March 26, 2004, utilizing the St. Louis County Circuit Court form created for such proceedings. (LF, 3). Following a motion to dismiss by the Prosecuting Attorney for St. Louis County (LF, 11), the non-answer by Chief Ronald Battelle (LF, 14) and the answer of the State of

[1] The State has no objection to the Exhibits (other than the necessity of Exhibit 7), including the Affidavit, contained in the instant Legal File. See, *State of Missouri's Brief*, page 17.

Missouri (LF 15), Dyer filed a First Amended Petition. (LF, 19, 21). The State of Missouri, sub nom. the Criminal Records Repository ("State") filed motions objecting to the expungement request and filed an Answer. (LF, 27-35). St. Louis County Prosecutor McCulloch also answered the Petition. (LF, 38).

On June 2, 2004, the day of trial, the Affidavit of Scott Dyer, along with eight (8) exhibits, were filed with the court. (LF, 41-81). The State did not appear at trial and offered no evidence. The Prosecutor's office did appear, but offered no evidence. The matter was heard by the Honorable Judge Clifford and a Judgment was entered on June 2, 2004, along with Findings of Fact and Conclusions of Law. (LF, 82).

On August 26, 2004, the State filed its Notice of Appeal out of time pursuant to the Special Order of the Supreme Court (LF, 89). The State alleged that jurisdiction of the Supreme Court was based upon the "validity of a statute or provision of the Constitution of Missouri." (LF, 93).

ARGUMENT

Standard Of Review

In the State's Brief, as to Point I, the State does not clearly identify the applicable standard of review.[2] In any court-tried case, the judgment of the trial court will be affirmed unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo.banc 1976). The Supreme Court cautioned that appellate courts should "exercise the power to set aside a decree or judgment on the ground that it is 'against the weight of the evidence' with caution and with a firm belief that the decree or judgment is wrong." *Id.* "Substantial evidence" is competent evidence from which the trier of fact could reasonably decide the case. *Wallace v. Van Pelt*, 969 S.W.2d 380, 382 (Mo.App.W.D. 1998). The reviewing court must view the evidence in the light most favorable to the judgment. *VanCleve v. Sparks*, 132 S.W.3d 902, 905 (Mo.App. 2004).

[2] The State's contention that the proceeding sounded in summary judgment defies the facts. Neither Dyer nor the State requested the trial court treat the Amended Petition as a motion for summary judgment and the judge did not address it that way. The trial court accepted Dyer's affidavit in lieu of his appearance at trial since he is a Colorado resident and did not have the funds to travel to St. Louis at the time. (LF, 41, ¶ ¶ 1, 10).

I.(1)[3] The Trial Court Did Not Err In Entering the Judgment and Order of Expungement of Arrest Records Because, As A Matter of Law, Common Law Expungement Has Not Been Barred In Missouri.

First, as a matter of clarification, the State misstates the facts in its first point on appeal. Contrary to the State's assertion, Dyer was not found guilty of forgery and stealing. (See, the *State's Brief*, page 19). Indeed, the "Sentence" form utilized in 1991 to enter the terms of the probation included two initial choices as to "guilt" in paragraph A, *to wit*,

> Defendant appears for sentencing, having on 4/5/91
>
> ? been found guilty of ? entered a plea of guilty to . . . .

(LF, 48). Being "found guilty" of an offense suggests that a trial or hearing has been held and that someone – a judge or jury – has "found", or decided, after hearing all the factual evidence in light of the controlling law, that a particular defendant is guilty of an offense; as opposed to someone entering into a negotiated sentence in which he/she pleas to an offense in exchange for something, such as a lighter sentence.[4]

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[3] Point I has been divided into parts (1), (2) and (3) to follow the division of the State's Points Relied On as set forth on p. 16.

[4] However, unlike an "Alford plea", in the situation of a suspended imposition of sentence, there may not necessarily be facts before the trial court justifying the court's acceptance of a guilty plea, rather there are various other considerations justifying the defendant's acceptance of a guilty plea in exchange for a probationary period. (See, *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). For example, youthful offenders may consider the cost of

defense and the enticement of getting past the matter because a suspended imposition of sentence was not regarded as a conviction. As Missouri courts have pointed out, "The obvious legislative purpose of the sentencing alternative of suspended imposition of sentence is to allow a defendant to avoid the stigma of a lifetime conviction and the punitive collateral consequences that follow. That legislative purpose is further evidenced in statutes concerning closed records; under § 610.105, RSMo 1986, if imposition of sentence is suspended, the official records are closed following successful completion of probation and termination of the case. Closed records are made available only in limited circumstances and are largely inaccessible to the general public. § 610.120, RSMo Supp.1991. Thus, with suspended imposition of sentence, trial judges have a tool for handling offenders worthy of the most lenient treatment. Worthy offenders have a chance to clear their records by demonstrating their value to society through compliance with conditions of probation under the guidance of the court. . . . [Further] [t]he legislature, has, in fact, enacted a number of exceptions to the general rule that punitive collateral consequences do not attach when imposition of sentence is suspended. For example, the statute defining prior, persistent and dangerous offenders, § 558.016.1, RSMo Supp.1991, was amended in 1981 to include those defendants who had merely pleaded guilty to or had been found guilty of a felony, even though no sentence was imposed. Similarly, § 491.050, RSMo 1986, providing for the use of a prior "conviction" for impeachment of a witness, was amended in 1983 to include prior pleas of guilty, pleas of *nolo contendere* and findings of guilt." *Yale v. City of Independence*, 846 S.W.2d 193, 195 (Mo. banc 1993) (emphases added).

Moreover, contrary to the State's assertions, unless abrogated by statute, common law expungement still exists in Missouri. As § 1.010 RSMo. provides:

> The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are not local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States, the constitution of this state, or the statute laws in force for the time being, are the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law, or with such statutes or acts of parliament; but all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.

Section 1.010 RSMo. 1969. See, *Respondent's Appendix*, A2. Hence, common law is the law of the land unless abrogated by statute or Constitution. *L.E. Lines Music Co. v. Holt,* 60 S.W.2d 32, 34 (Mo. 1933). Generally, if there is no conflict between common-law remedy and a statute, the common-law remedy is to be given effect. *Wince v. McGarrah*, 972 S.W.2d 641, 643 (Mo.App. 1998).

Furthermore, the State's citation to a footnote in a case that did not actually address common law expungement is not controlling. *Cantrell v*. State, 624 S.W.2d 495, 496 n. 3

(Mo.App.W.D. 1981)[5]. See, *State's Brief*, p. 19. It is correct that while not explicitly recognized by Missouri courts, common law expungement has never been expressly barred or prohibited by Missouri courts. Indeed, in *State e rel. Reed v. Harris*, 153 S.W.2d 834 (Mo. 1941), the Supreme Court gave an agreeable nod to common law expungement. There, a writ of prohibition was brought by the State of Missouri to prevent a lower court from entertaining jurisdiction in a lawsuit wherein it was sought to enjoin the sending of police photographs and fingerprints of an arrestee to various law enforcement agencies throughout the country, which photographs and fingerprints were made while the arrestee was actually in custody on a charge of having violated a traffic ordinance. This Court noted that courts do recognize the right of innocent persons to the return of such records and exhibits and

[5] In *Cantrell*, a pro se federal prison inmate filed a proceeding for "Expungement and Order Directing Request for Return of Files" alleging that the criminal records kept by the Missouri State Highway Patrol mistakenly reported a 1964 burglary conviction that in fact had been reversed by the Missouri Supreme Court and had never again been prosecuted. This report, he alleges, impairs the grant of a federal parole from his imprisonment. *Id.* at 495. While petitioner appeared to be alleging a claim for common law expungement (while the present expungement statute did not exist), the court found that instead, his was essentially a claim for correction of a clerical error that should more properly be lodged in the venue where the conviction occurred. Because his petition was in the improper venue, it was dismissed. *Id.* at 496. In the opinion, the court never addressed the applicability of common law expungement, therefore, the case is not on point here.

concluded that it was sufficient under the circumstances to say that it would not hold that a cause of action could not be stated. 153 S.W.2d at 837. The Court explained that it was unwilling to hold, in effect, that under no circumstances could the circulation of such photographs and fingerprints to other agencies where they would be permanently kept and exhibited be restrained. *Id.*[6]

Accordingly, to the extent that the trial court in this case premised its judgment on a common law right to expungement, it properly declared and applied the law and the judgment should be affirmed.

I.(2) The Trial Court Did Not Err By Entering the Judgment and Order of Expungement of Arrest Records Because An Equitable Expungement Remedy Existed In Missouri At The Time Of The Arrest and Continues to Exist In That Courts Have the Inherent Authority To Order Expungement And Because Dyer Proved And The State Failed to Rebut The Evidence Showing That Exceptional Circumstances Existed.

As the State correctly points out, prior to the enactment of the current statutory expungement scheme, Missouri courts could and did order equitable expungement within their inherent equity powers. *State ex rel. Peach v. Tillman*, 615 S.W.2d 514 (Mo.App. E.D. 1981). The test for expungement was based upon whether extraordinary circumstances

[6] Although expunction was not ordered, the court of appeals held that authority existed for the discretionary grant of equitable expunction of criminal records under various circumstances. *Lindsay v. Hopkins*, 788 S.W.2d 776, 778-79 (Mo.App. 1990).

existed to warrant expungement. *Buckler v. Johnson County Sheriff's Department*, 798 S.W.2d 155, 158 (Mo.App. 1990). Expungement could also be ordered in cases involving illegal prosecution or acquittal.[7]

In *Buckler*, Buckler was arrested for "investigation of rape", but was not presented to a judge and was released without bond. No further action was taken and the assistant prosecutor declined prosecution. *Id.* at 157. Buckler later sought expungement of his arrest records because he aspired to a career in law enforcement. The court found significant the fact that the apparent purpose of Buckler's arrest was to coerce his consent to permit a polygraph examination. That fact, combined with the absence of other witnesses, the prosecutor's declination to prosecute and Buckler's career goal in law enforcement, collectively generated enough information to warrant the court's inherent equitable power of expungement on the grounds of extraordinary circumstances. *Id.* at 158.

It is noteworthy that the court explicitly held that whether his "arrest . . . was valid is not determinative of whether the record of his arrest should be expunged." *Id.* at 157.

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[7] Moreover, the federal courts have determined that they have inherent equitable power to expunge criminal records when necessary to preserve basic legal rights. *Menard v. Saxbe*, 498 F.2d 1017, 1023 (D.C.Cir. 1974). Federal courts have remarked that this power to expunge criminal records "is a narrow one, to be exercised in cases of illegal prosecution or acquittals and is not to be routinely used." *United States v. McMains*, 540 F.2d 387 (8th Cir. 1976).

Indeed, the court found that probable cause existed to effect the arrest and his arrest was not otherwise invalid. *Id.*

Following *Buckler*, in *Kuenzle v. Missouri State Highway Patrol*, 865 S.W.2d 667, 669 (Mo. banc 1993), this Court clarified that "extraordinary circumstances" means more than simply seeking employment with law enforcement agencies. Since the legislature had then amended the "arrest records statute specifically to allow access to criminal justice applicants' arrest records," "extraordinary circumstances require, at a minimum, circumstances outside the plain language of the arrest records statute." *Id.* Thus, *Kuenzle* is also inapplicable to the instant case because there the question simply was whether equity usurped the rights clearly established by the legislature to allow access to criminal justice applicants' records and the Court held "no." Here, Dyer is not seeking employment with the criminal justice system, so *Kuenzle* is inapplicable.[8]

In the instant case, contrary to the holdings in these two cases, the State suggests that whether the records illustrate probable cause to believe that Dyer committed the crime is the dispositive ingredient in deciding whether to allow equitable expungement. See, *State's*

[8] It is significant, however, that the Court in *Kuenzle* acknowledged the viability of equitable expungement in finding that, although equitable expungement had been replaced with statutory expungement, a trial court may still be "guided by equitable principles in determining" whether an arrest record should be expunged. 133 S.W.2d at 526. To the extent that *Kuenzle* is a decision of this Court and has not been overruled, it should be followed on this issue.

Brief, p. 21. The State dismisses Dyer's evidence that the arrest was based on false information and that there was no evidence to believe he committed the offenses as being "cagey," especially in light of the "guilty pleas" Dyer entered. The State instead "cagily" argues that just because Dyer's evidence was that he did not commit the crime, he could have "aided" in it. The issue is whether it was based on false information regardless of who gave it and Dyer should be entitled to the benefit of reasonable inferences. The assertion that a "guilty plea is an admission that the pleader engaged in the conduct alleged" is a simplistic statement. As discussed *supra*, (pp. 9-10, n. 4) many considerations go into pleading guilty to an offense, especially under the terms of a suspended imposition of sentence, such as teenage defendants, costs of defense and the promise of no conviction on one' record. Indeed, the State's reliance on *State v. Daniels*, 789 S.W.2d 243 (Mo.App. W.D. 1990) for the proposition that once one pleads guilty to an offense, he is collaterally estopped to deny the crime in the future, is misplaced. In *Daniels*, the defendant was tried to the court without a jury, found guilty and did not appeal. Here, Dyer pled guilty in a negotiated plea agreement, but was not found guilty by a court or jury.

In response to silence from the State as to any evidence against Dyer, Dyer produced evidence that illustrated his entitlement to equitable expungement and the trial court found such in its Findings of Fact, Conclusions of Law and Judgment, *to wit*, the arrest was based on false information; there was no probable cause at the time of the petition to expunge to believe that Dyer committed the offense; no charges were being pursued; no civil action was pending; Dyer did not receive a suspended imposition of sentence for the offense after the passage of House Bill 135; HB 135 is unconstitutional; and Dyer has no other adequate

remedy at law; (LF, 82-84, Judgment, ¶ ¶ 5, 6, 7, 8, 9, 12, 13 and 16). Moreover, the trial court had before it numerous letters, certificates of achievement and completion, honorable discharge from the U.S. Air Force and information that Dyer lost his job with Delta Building Services as a Chief Building Engineer at the Alfred ARRAJ Courthouse in Denver, Colorado, because he was unable to renew his security clearance due to this Missouri arrest. (LF, 41-42, Affidavit of Scott Dyer; 61-76, 81, Exhibits 2 through 6 and 8). Collectively, these factors constitute exceptional circumstances warranting expungement under the trial court's inherent equity power. (LF, 84, Judgment ¶ 13).

Finally on this point, the State's heading that "Equitable Expungement is Barred by Statute" is not accurate. As stated above, the Court in ***Kuenzle*** acknowledged the viability of equitable expungement in finding that, although equitable expungement had been replaced with statutory expungement, a trial court may still be "guided by equitable principles in determining" whether an arrest record should be expunged. 133 S.W.2d at 526. (See, *supra*, footnote 6, page 15).

Even the amendment to § 610.126.2 RSMo. in 1995, which states:

> Except as provided by sections 610.122 to 610.126, the courts of this state shall have no legal or equitable authority to close or expunge any arrest record.

(1995 Mo.Session Law HB 135) does not change this outcome. Dyer's arrest, suspended imposition of sentence and period of probation all occurred prior to 1995. Since a suspended imposition of sentence does not constitute a judgment, as of 1994, Dyer's previous criminal

history was all but extinguished by the completion of his probation.[9] Accordingly, the trial court in this case could and did consider the equitable considerations it had before it in evidence in ordering expungement.

Therefore, to the extent that the trial court in this case premised its judgment on its inherent right to order expungement based upon equitable principles, it properly declared and applied the law and the judgment should be affirmed.

I.(3) The Trial Court Did Not Err By Entering the Judgment and Order of Expungement of Arrest Records Because Dyer Does Not Need to Establish a Right to Expungement Under the Expungement Statute Because, At The Time Of The Arrest And Sentence, The Expungement Statute Did Not Exist And An Equitable Expungement Remedy Existed In Missouri Which Was Applicable.

Again, the State incorrectly states that Dyer was "found guilty" of forgery and stealing. See, *State's Brief*, pp. 24, 25. As set out above, Dyer was not found guilty of forgery and stealing. (See, *supra*, pp. 10-12, n. 4). The "Sentence" form utilized in 1991 to enter the terms of the probation included two initial choices as to "guilt" in paragraph A, *to wit*,

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[9] It is well settled that a suspended imposition of sentence does not constitute a judgment. See, *State v. Lynch*, 679 S.W.2d 858, 860 (Mo.banc 1984) and its progeny. Accordingly, essentially after the period of probation expired, Dyer's arrest was to be treated as though it had never occurred.

Defendant appears for sentencing, having on 4/5/91

? been found guilty of ? entered a plea of guilty to . . . . (LF, 48).

Plainly, under the terms of the Sentence form itself, "guilt" may be premised upon two different understandings of "guilt"; and, in Dyer's case, he was not "found guilty" of any offense.

As set out above,[10] it is too simplistic to say that a guilty plea "makes it clear that the arrest was not based on false information and that there is probable cause to believe Dyer committed the offenses." See, *State's Brief*, p. 26. Such a simplistic statement, if true, would turn the entire criminal justice system on its head and no one would ever "plead guilty" in order to obtain a lighter sentence or probation. In *Buckler*, in cases of expungement, the appellate court explicitly held that whether the defendant's "arrest . . . was valid is not determinative of whether the record of his arrest should be expunged." 798 S.W.2d 155, 157 (Mo.App. 1990). In fact, the court had found that probable cause existed to effect the arrest and that the defendant's arrest was not otherwise invalid. *Id.*

The State further acknowledges that following Dyer's suspended imposition of sentence, he presumably complied with all of the terms of his probation and was routinely discharged therefrom. See, *State's Brief*, p. 26. The State continues by arguing that the "record does not support the expungement" under the current statutory scheme. See, *State's Brief*, pp. 26-27. The State then relies on *Wesley v. Crestwood Police Department*, 148 S.W.3d 838 (Mo.App.E.D. 2004), which is factually distinguishable and, therefore, not

[10] *Supra*, pp. 10-12 and n.4.

applicable to the instant case. In *Wesley*, defendant was arrested in 1999 for petty larceny. 148 S.W.3d at 838. He then pleaded guilty in 2000 to the charge and received a suspended imposition of sentence. In the expungement proceeding there, the State attached to its Answer, in which it objected to the expungement, an eight-page criminal history of Wesley. *Id.* at 839. At the time the trial judge heard the case, Wesley had not included any evidence in the record and the record was devoid of any evidence that Wesley's arrest was based on false information. "There was no evidence introduced . . . contradicting the State's records." *Id.* at 840.

Contrariwise, in the instant case, a record did exist and the Court may review the judgment based on the legal file. *McNally v. St. Louis County Police Dept.*, 17 S.W.3d 614, 616 (Mo.App.E.D. 2000). Here, the record contained information from which the trial court could find that the arrest was based on false information and/or that there was no probable cause to believe that Dyer committed the charged offenses. (See LF, Affidavit of Scott Dyer, 41-42; List of Exhibits, 43-44; Exhibits 2-8, 61-81).[11] Moreover, as asserted by the State,

[11] In addition to the first factor required by § 610.122 RSMo., subsection (1) requires that there must be evidence that there was no probable cause, at the time of the action to expunge, to believe the individual committed the offense. Here, the question for the trial court under § 610.122(1) RSMo. was whether there was no probable cause *at the time of the action to expunge* to believe Dyer committed the offenses of stealing under $500 and forgery, not at the time of trial. The evidence before the trial court at the expungement proceeding was Dyer's affidavit establishing that there was no probable cause, at the time of the action to

although there was no statutory expungement in 1991, equitable expungement did exist and the trial court in its inherent authority could order Dyer's record expunged.

Accordingly, to the extent that the trial court in this case premised its judgment on its inherent right to order expungement based upon equitable principles, it properly declared and applied the law and the judgment should be affirmed.

II. The Trial Court Did Not Err By Entering The Judgment And Order Of Expungement Of Arrest Records And Therein Declaring The Expungement Law, As Amended In 1995, Unconstitutional Because The Court Could Decide The Outcome Of This Case Without Deciding The Constitutional Question In That Within Its Inherent Authority The Trial Court Properly Determined That Dyer Was Entitled To Equitable Expungement Of His Arrest Records; And,

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expunge, to believe Dyer committed the offense because he did not commit the offenses, rather the person he was with at the time stole the gym bag and cashed two checks by filing in his name as payee. (LF, 41, Affidavit of Dyer, ¶ 3-4). Further, no charges were pursued as a result of the arrest; Dyer has had no prior or subsequent misdemeanor of felony convictions; and no civil action is pending relating to the arrest or the records. § 610.122(2-3, 5) RSMo. Finally, § 610.122(4) RSMo., which currently requires that there must be evidence that the subject of the arrest did not receive a suspended imposition of sentence for the offense, is not applicable to this case because that language was added by the Missouri legislature well after Dyer had received a suspended imposition of sentence and completed the accompanying probation.

Even If The Court Considers The Constitutional Issues Raised By Dyer, It Should Find That The Trial Court Did Not Err By Entering The Judgment Because HB 135 Was Constitutionally Defective In That (A) The Title And Subject Were Unclear Because The Bill Dealt With A Substantial Change To This Law And The Bill Contained More Than One Subject, (B) The Petition Was Not Barred By The Statute Of Limitations And (C) The Bill Unconstitutionally Operates As A Retrospective Law As Applied To Dyer.

The State is correct by its reference to *M.P. v. Missouri Department of Social Services*, 147 S.W.3d 765 (Mo.banc 2004), in which this Court decided that the constitutionality of a statute was irrelevant to the outcome of the case. In *M.P.*, the Court found that where the respondents had already received complete relief by the expungement of their names from a child abuse registry, a trial court decision on the constitutionality of a statute should be vacated. 147 S.W.3d at 766. Therefore, if a constitutional issue is irrelevant to the outcome of a case, it is unnecessary for this Court to address the constitutional questions raised in the appellate briefs.

Dyer included the constitutional challenges in his Petitions and the trial court included the same as alternative reasons for sustaining the judgment of expungement. However, since Point I above is dispositive of this appeal, it is not necessary to delve into the constitutional issues also implicated in this appeal.

That being said, Dyer will respond to the constitutional questions of HB 135's title and content and the retroactive application of the current expungement statute as applied to the facts in this case.

(A) The Title And Subject Of HB 135 Were Unclear Because The Bill Dealt With A Substantial Change To The Law And It Contained More Than One Subject.

First, the 1995 amendments to §§ 610.122 and .126 in HB 135 that eliminated expungement for those who had received a suspended imposition of sentence and eliminated equitable expungement are unconstitutional because the title and subject of the Bill did not clearly express the intent of the Legislature to eliminate expungement in these circumstances and because the Bill contained more than one subject. (LF, 22, Count II, ¶¶ 3(b) and (d)).

Even the title as set out in the State's Brief (p. 34) illustrates that it was unclear what was happening with the passage of this Bill. An objective observer would never have had any idea that this Bill was eliminating expungement for persons who had a suspended imposition of sentence and that it was outlawing equitable expungement. In fact, by its title, which relates to "confidentiality of certain information", one would never know what kind of information was being held confidential; and, indeed, expunction, or deletion, of arrest records, is plainly not the same thing as this generalized "protection of confidential information from public disclosure."

A review of HB 135 also evidences that it dealt with statutes involving more than one subject in that it dealt with communications that are assistive for the benefit of individuals with hearing, speech, or physical impairments, which has nothing to do with expunction of arrest records. See, e.g., §§ 209.265, 610.150.2 at *State's Appendix* 22, 25.

In addition, the State argues on the one hand that HB 135 in this case is not "so ground breaking" because it deals with all existing statutes and does not create new laws. (*State's Brief*, p. 38). On the other hand, the State asserts that substantive changes did occur

as a result of the passage of HB 135. At page 23, the State says that not only did HB 135 eliminate the time limits on bringing expungement actions, it added a specific provision that a suspended imposition of sentence was a bar to expungement and it added § 610.126.2 RSMo., which states:

> Except as provided by sections 610.122 to 610.126, the courts of this state shall have no legal or equitable authority to close or expunge any arrest record.

(*State's Brief*, p. 23; 1995 Mo. Session Laws HB 135). Hence, equitable expungement, a remedy that had been available to petitioners, was no longer a remedy. These are substantive, not procedural, changes to the existing law.

(B) The Amended Petition Was Not Barred By The Statute Of Limitations.

Furthermore, the State does not favor Dyer or the Court with an analysis of how the title and the content are "procedural defects" that must be raised within the statute of limitations set forth in § 516.500 RSMo., rather than "substantive" defects. "Substantive law" has been defined as:

> That part of law which creates, defines and regulates rights, as opposed to "adjective or remedial law," which prescribes methods of enforcing the rights or obtaining redress for their invasion. That which creates duties, rights and obligations, while "procedural or remedial law" prescribes methods of enforcement of rights or obtaining redress.

Black's Law Dictionary, p. 1281 (5th ed.). Based on this definition, Dyer's challenges to the content and title of HB 135 are substantive defects, not procedural defects, and the statute of limitations in § 516.500 RSMo is not applicable.

(C) The Bill Unconstitutionally Operates As A Retrospective Law As Applied To Dyer.

Article I, § 13 of the Missouri Constitution prohibits the enactment of any law that is "retrospective in its operation."[12] See, *Respondent's Appendix*, A3. Retrospective laws are generally defined as laws which "take away or impair rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past." *Lucas v. Murphy*, 348 Mo. 1078, 156 S.W.2d 686, 690 (1941), as expressed by Justice Story in *Society for Propagation of Gospel v. Wheeler*, 22 F.Cas. 756 (C.C.D.N.H.1814) (No. 13, 156); *Dept. of Social Services v. Villa Capri Homes, Inc.*, 684 S.W.2d 327, 332 (Mo. banc 1985); *Doe v. Diocese*, 862 S.W.2d 338, 340-41 (Mo. 1993).

Contrary to the State's contention, and as discussed in Point I above in this Brief, Dyer has had a right to expungement of his arrest records from 1990 and 1991. Thus, as to Dyer, HB 135 has unconstitutionally operated as a retrospective law. The trial court's inherent equitable authority to expunge Dyer's 1990-91 criminal records cannot be ignored because Dyer received a suspended imposition of sentence and completed the term of his probation prior to 1995. Only after 1995, were courts statutorily prohibited from expunging suspended imposition of sentences. As applied to Dyer, HB 135 would "attach a new

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[12] The full text of *Article I, § 13,* provides:

> That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.

disability in respect to transactions or considerations already past." *Id.* The State is trying to put Dyer in a "catch 22", saying that he cannot have equitable expungement now because of the arbitrary statutory creation even though he would have been entitled to it at the time of the suspended imposition of sentence.

Accordingly, to the extent that the application of HB 135 to Dyer's arrest and sentence in 1990-91 is a retrospective application of law, it violates the Missouri Constitution and should not be applied to Dyer. The Judgment of the trial court should be affirmed because it properly declared and applied the law.

CONCLUSION

For the foregoing reasons, the trial court's Judgment was supported by substantial evidence; and the trial court properly applied the law in granting Respondent Scott Dyer's First Amended Petition in light of the evidence and affidavit on file and in entering the Findings of Fact and Conclusions of Law and the Judgment. For those reasons, Respondent Scott Dyer respectfully prays that this Court affirm the judgment of the trial court.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies as counsel of record for Respondent Scott Dyer that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the word count for this brief is 5,832 per Microsoft Word 97 and that the labeled diskette simultaneously filed with the hard copies of the brief and provided to the Court has been scanned for viruses and is free of same.

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The undersigned hereby certifies that one true and correct copy of the foregoing Brief of Respondent Scott Dyer and one disk containing the foregoing brief, were mailed, postage prepaid, overnight express delivery, this 18th day of January, 2005, to Jeremiah W. (Jay) Nixon, Attorney General, David F. Barrett, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, Attorneys for the State of Missouri; Patrick E. Richmond, St. Louis County Prosecutor's Office, 100 S. Central, Clayton, Missouri 63105; and Linda S. Wasserman, St. Louis County Counselor's Office, 41 S. Central, 9th Floor, Clayton, Missouri 63105.

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